SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1974

No. 73-1786

HENRY G. DUCKSTEIN, *Petitioner*

v.

GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION, *Respondent*

Petition for Writ of Certiorari to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth in Cause No. 17429, Wherein Henry G. Duckstein Was Appellant and General Dynamics Corporation, Fort Worth Division Was Appellee

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Fort Worth, Texas 76105

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IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM 1974

No._____

HENRY G. DUCKSTEIN, *Petitioner*

v.

GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION, *Respondent*

Petition for Writ of Certiorari to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth in Cause No. 17429, Wherein Henry G. Duckstein Was Appellant and General Dynamics Corporation, Fort Worth Division Was Appellee

Henry G. Duckstein respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, entered in this cause on September 21, 1973.

OPINION BELOW

The judgment of the 96th District Court of Tarrant County, Texas, in Cause No. 96-5206-70, rendering summary judgment in favor of General Dynamics Corporation, Fort Worth Division, was entered on January 15, 1973 (Appendix A, p. A-1).

The opinion rendered by the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, on September 21, 1973, affirming the summary judgment of the District Court, is reported at 499 S.W.2d 907 (Appendix B, p. A-3), and on October 19, 1973, the Court of Civil Appeals overruled Petitioner's Motion for Rehearing, 499 S.W.2d 907 (Appendix B, p. A-14).

On January 23, 1974, the Supreme Court of Texas refused Petitioner's Application for Writ of Error (No reversible error.) without opinion, 17 Tex. Sup. Ct. Jnl. 162 (Appendix C, p. A-15), and on March 6, 1974, the Supreme Court of Texas overruled Petitioner's Motion for Rehearing of the Application for Writ of Error, 17 Tex. Sup. Ct. Jnl. 225 (Appendix C, p. A-15).

JURISDICTION

The judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth was entered on September 21, 1973, and on October 19, 1973, the Court of Civil Appeals overruled Petitioner's Motion for Rehearing.

The Supreme Court of Texas refused (No reversible error.) timely Application for Writ of Error on January 23, 1974, and overruled Petitioner's Motion for rehearing on March 6, 1974.

The jurisdiction of the Supreme Court of the United States is invoked under United States Constitution, Article I, Section 8, Clause 3; United States Constitution, Aricle III, Section 2; Section 301(a) of the Labor

Management Relations Act, 29 U.S.C. § 185(a); and 28 U.S.C. § 1257(3).

At all times material to the controversy involved in this suit, Respondent was engaged in interstate commerce within the meaning of the Labor Management Relations Act 29 U.S.C. § 141, et seq. (Appendix D, p. A-17).

Question Presented

Do the existence of a weak union with a poor record and exclusive arbitration provisions in an employer-union contract result in a union member who has been wrongfully discharged and who has made reasonable efforts to cause the union to act on his behalf being unable to bring suit against the employer after the arbitration procedures have come to an unfavorable conclusion?

Statute Involved

The statute involved is Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a): "Suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of the Case

Petitioner alleged that on May 27, 1967, he was an employee of Respondent and a member of Federated

Independent Texas Unions, Aircraft Local No. 900. About May 27 or 28 of 1967, Petitioner went to Mexico on a vacation. His vacation was to end, and he was to report back to work for Respondent, at 3:45 P.M. on June 6, 1967. While in Saltillo, Coahuila, Mexico, Petitioner had a sudden and painful attack of gout. On June 6, 1967, Petitioner sent a telegram to Respondent which stated, "I am reporting off: sick." On June 9, 1967, Petitioner's toenails were surgically removed in Hospital Civil de Saltillo (Saltillo Civil Hospital) in Saltillo, Coahuila, Mexico.

On June 23, 1967, Petitioner, in Fort Worth, Texas, learned that on June 6, 1967, Respondent had sent a telegram to Petitioner's address in Fort Worth, Texas, which read, "We have reason to believe that you are able to return to work. If you do not report for work by 7:00 A.M. on 8 June 1967 or furnish written medical proof of your inability to do so you will be terminated." Petitioner also learned that on June 15, 1967, a telegram had been sent to his home address in Fort Worth, Texas, which read, "This is to advise that you are being terminated effective 8 June for failure to furnish written medical proof of inability to work or report to work as instructed." Nobody had been at Petitioner's home in Fort Worth, Texas, to receive either telegram.

The opinion of the Court of Civil Appeals recites (499 S.W.2d 907, 908): "By deposition taken of plaintiff, a part of the record before the court on the defendant's Motion for Summary Judgment, it was established that he elected to resort to the machinery

provided by the contract between plaintiff's Union and the defendant company to have application in instances of grievance initiated against the company. It is undisputed that plaintiff caused the grievance procedure to be initiated. Testimony of plaintiff relative to subsequent action by him established that the processing of his grievance was, as a matter of law, ratified and adopted by him until such processing reached what is termed by the contract as the third stage. At such time memorandum agreed to by the Plant Grievance Committee representing the plaintiff's Union and a representative of the defendant company was made to reflect disposition of plaintiff's case as follows: 'Plant Grievance Committee, Stage Three. Date 16 August, 1967. Settlement of Grievance: Mr. Duckstein has not contacted the Company or the Union. Due to lack of information and cooperation from Mr. Duckstein, case closed.' "

The memorandum should be considered along with Petitioner's Affidavit in Opposition to Motion for Summary Judgment (Appendix E, p. A-18) in which he states, inter alia:

> "After my discharge by General Dynamics, I was refused admittance to the plant by the guards. I was unable to contact any of the union officers in the plant and I was unable to contact them elsewhere, because the union had no permanent headquarters.
>
> I was unable to obtain my personal belongings from inside the plant, and I was compelled to engage an attorney to aid me in recovering my goods from the plant.

> My only course by which I was able to contact the union was by phone. I explained the situation to Mr. Bart Lynch, acting union committeeman of our department, as soon as I became aware I had been discharged, and he assured me that a grievance would be filed on my behalf. I never abandoned my grievance or complaint . . ."
>
> "Dalton Miller states in his affidavit that he made attempts to contact me through fellow workers. But I never received word that Mr. Miller desired information from me . . ."
>
> "I cannot recall ever knowing a Mr. Creed . . ."

Respondent has never brought out what Petitioner could have done that he did not do, if anything, to exhaust his grievance procedure through the union.

PRESENTATION OF THE FEDERAL QUESTION

The federal question is, in essence, the application of Section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)) to the facts of this case.

Petitioner filed suit against Respondent in a District Court of Tarrant County, Texas. He plead the contract existent at all material times between his union and Respondent as a basis for his cause of action for damages for breach of such contract by Respondent.

In Plaintiff's Second Amended Original Petition Petitioner alleged, inter alia, on page four:

> "Due to lack of financial resources, lack of an independent operating base outside the premises of Defendant (the premises of Defendant being

> closed to the public), and apathy of its members at the time of Plaintiff's discharge and during the grievance procedure which was initiated pursuant thereto, although Plaintiff made a good faith and reasonable attempt to exhaust his remedies through the grievance procedure set forth in the contract between Defendant and the union, the union could not have been expected to and did not offer substantial, independent, and forceful representation of Plaintiff and only perfunctorily pressed Plaintiff's claim."

Plaintiff's Response to Defendant's Motion for Summary Judgment (Appendix E, p. A-18) raises the issue of union weakness and the attempt by Petitioner to exhaust his remedies through the grievance procedure in the union agreement. The trial court ruled adversely to Petitioner (Appendix A, p. A-1). The issue of union weakness was raised in Petitioner's points of error in the Court of Civil Appeals and in the Supreme Court of Texas (Appendix F, p. A-27), and the Court of Civil Appeals and the Supreme Court of Texas ruled adversely on Petitioner's points (Appendices B, p. A-3 and C, p. A-15). Petitioner's Brief in Opposition to Motion for Summary Judgment, filed in the trial court, cited and quoted from *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed. 2d 580, (1964) and *Vaca v. Sipes, Administrator*, 386 U.S. 171, 87 S.Ct. 903, 13 L.Ed. 2d 580 (1966), which depend on the Labor Management Relations Act and in particular Section 301. These cases were also cited and quoted in Petitioner's brief in the Court of Civil Appeals and in the Petition for Writ of Error in the Supreme Court of Texas.

Reasons for Granting the Writ

In considering whether union representation has been fair, the courts ask whether the union has acted arbitrarily or in bad faith. But no United States Supreme Court case has been found which turns on the issue of union weakness. Thus, the cases of *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 13 L.Ed. 2d 580, 85 S.Ct. 614 (1964) and *Vaca v. Sipes, Administrator*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1966), while helpful, are not precisely in point.

Some idea of the structure of the labor movement may be gained from Appendix H, p. A-36.

Members of small, independent unions find themselves at a disadvantage, when the employer is large and powerful, as compared with members of large unions. In such a situation the policy of federal labor law contemplating a balance of power between unions and employers is thwarted.

The real parties in interest are the employers and employees. Unions owe their legal existence and power to the policy of the law which tries to balance the power of employees with that of employers. What guarantee does an employee have that what appear to be his contract rights under an employer-union contract will be of actual benefit to him? The only guarantee he has, it appears, is the strength of the union.

It might be thought that since the union was strong enough to get certain provisions into the contract, it should be strong enough to enforce them. But if an employer knew that a union was too weak to enforce the contract, the employer might not negotiate too

strongly at the bargaining table, if the contract were to contain an exclusive grievance procedure clause. It would be to the employer's advantage to make the union look good on paper. (The grievance procedure provisions contained in the employer-union contract in this case may be found in Appendix G, p. A-32).

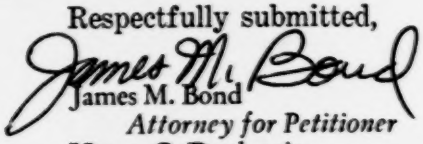
Some of the criteria which might be useful in determining union weakness are lack of an independent operating base outside the premises of the employer, especially where the premises of the employer are closed to the public, and a poor record of enforcement of contract provisions. In such cases, after an employee has attempted to use the contract grievance procedure, it would not seem inconsistent with the policy of the law to allow him to deal directly with the employer in the courts.

Conclusion

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Evidence of the union's weakness in this case may be found in Petitioner's Affidavit in Opposition to Motion for Summary Judgment, (Appendix E, p. A-21) and in Mart Lynch's Affidavit in Opposition to Motion for Summary Judgment (Appendix E, p. A-24).

Respectfully submitted,



James M. Bond
Attorney for Petitioner
Henry G. Duckstein
3023 East Rosedale Street
Fort Worth, Texas 76105

Certificate of Service

This is to certify that on or before the 24 day of May, 1974, a true and correct copy of the foregoing Petition for Writ of Certiorari to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth was served upon the Hon. John H. McBryde, 1409 Schick Building, 210 West Sixth Street, Fort Worth, Texas 76102, counsel for Respondent, by depositing three copies thereof in a United States post office or mail box with first class postage prepaid, certified or registered return receipt requested, addressed to him at his foregoing last known address.

James M. Bond

James M. Bond
Attorney for Petitioner
Henry G. Duckstein
3023 East Rosedale Street
Fort Worth, Texas 76105

APPENDIX A

IN THE
DISTRICT COURT OF TARRANT COUNTY,
TEXAS
96th JUDICIAL DISTRICT

NO. 96-5206-70

HENRY G. DUCKSTEIN

VS.

GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION

JUDGMENT

Came on to be heard and considered the motion for summary judgment of General Dynamics Corporation, defendant in the above entitled and numbered cause, and appeared before the Court plaintiff, Henry G. Duckstein, by and through his attorney of record, and defendant, General Dynamics Corporation, by and through its attorney of record, and it appearing to the Court and the Court finds that said motion was duly filed, that the hearing thereon was duly scheduled and that plaintiff was duly served with a copy of said motion and was duly notified of the hearing thereon, the Court proceeded to hear and consider said motion, together with the pleadings, admissions, answers to interrogatories, two depositions and four affidavits on file herein, to hear argument of counsel and to consider

briefs submitted on behalf of each party, and, after having considered same, the Court is of the opinion and finds that the grounds of said motion are good and that said motion should be granted.

IT IS, THEREFORE, ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the motion for summary judgment of defendant, General Dynamics Corporation, should be and it is hereby granted in its entirety, and IT IS FURTHER ORDERED that Henry G. Duckstein, plaintiff, in this cause, have and recover nothing from General Dynamics Corporation, defendant in this cause, and IT IS FURTHER ORDERED that all costs herein be taxed against the plaintiff, for which execution may issue.

RENDERED AND SIGNED this the 15th day of January, 1973.

s/ Joe Spurlock
JUDGE PRESIDING

APPENDIX B

IN THE
COURT OF CIVIL APPEALS
FOR THE
SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS

NO. 17429

HENRY G. DUCKSTEIN
APPELLANT
VS.
GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION
APPELLEE

FROM THE DISTRICT COURT
OF TARRANT COUNTY

OPINION

The appeal is from a summary judgment granted on motion of the defendant General Dynamics Corporation, Fort Worth Division, against the plaintiff Henry G. Duckstein.

We affirm.

Plaintiff's allegations were that on May 27, 1967 he was a member of the Union which had a contract with the defendant affecting his interests as an employee of the defendant company; that at such time he went to Mexico on a vacation, upon termination of which he was to report back to work at 3:45 P.M. on June 6,

1967; that shortly prior to the time he was due to return to Fort Worth, Texas, his place of employment, he had a sudden attack of gout and that about June 4, 1967 his toenails became infected so that it was the advice of a Dr. Calderon, of Saltillo, Mexico, that his toenails should be surgically removed. Further, that on June 6, 1967 he sent a telegram to the defendant company reporting absence from work because of illness; that he visited the Hospital Civil de Saltillo in Saltillo, Mexico; that on June 8, 1967 he checked into the hospital and the following day had his toenails surgically removed.

Additional allegations were that on June 23, 1967 plaintiff was back home in Fort Worth and he learned that on June 6, 1967 the defendant company had sent a telegram to him at his Fort Worth address purporting to inform him that if he did not report for work by 7:00 A. M. on 8 June 1967 or furnish written medical proof of inability to do so his employment by defendant would be terminated. He also learned that on June 15, 1967 a telegram had been sent to his home address, which read: "This is to advise that you are being terminated effective 8 June for failure to furnish written medical proof of inability to work or report to work as instructed." No one had been present at plaintiff's home to receive them when the telegrams were sent. Thereafter plaintiff notified his Union of what had happened, but he could not immediately get proof from Mexico; further, that it was not customary for a sick employee to have to furnish a doctor's certificate if he missed only a few days of work.

By deposition taken of plaintiff, a part of the record

before the court on the defendant's Motion for Summary Judgment, it was established that he elected to resort to the machinery provided by the contract between plaintiff's Union and the defendant company to have application in instances of grievance initiated against the company. It is undisputed that plaintiff caused the grievance procedure to be initiated. Testimony of plaintiff relative to subsequent action by him established that the processing of his grievance was, as a matter of law, ratified and adopted by him until such processing reached what is termed by the contract as the third stage. At such time memorandum agreed to by the Plant Grievance Committee representing the plaintiff's Union and a representative of the defendant company was made to reflect disposition of plaintiff's case as follows: "Plant Grievance Committee, Stage Three. Date 16 August, 1967. Settlement of Grievance: Mr. Duckstein had not contacted the Company or the Union. Due to lack of information and co-operation from Mr. Duckstein, case closed."

On December 22, 1970 plaintiff filed suit against the defendant company in a District Court of Tarrant County, Texas. He plead the contract existent at all material times between his Union and the defendant as a basis for his cause of action for damages for breach of such contract on the part of the defendant company. He alleged damages in the amount of $49,-250.00 in consequence of wrongful discharge from employment.

In the trial court the defendant company moved for summary judgment. Upon the hearing a take-nothing summary judgment was rendered in behalf of the

defendant. The plaintiff appealed, and there was submission of the case to this appellate court.

On submission it appears from the arguments of both parties that there is no question but that the leading case applicable to the question of when a litigant in position of the plaintiff is entitled to maintain his cause of action in a suit filed for that purpose is Vaca v. Sipes, 386 US 171, 17 L ed 2d 842, 87 S Ct 903 (1967).

Beginning at page 854 (L. Ed.) of the opinion in Vaca v. Sipes is to be found the pertinent law applicable here. Pertinent paragraphs begin with that reading "However, if the wrongfully discharged employee himself resorts to the courts . . . ." Pertinent paragraphs conclude with citations of authorities, as follows: "See generally Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich L Rev 1435, 1482-1501 (1963); Comment, Federal Protection of Individual Rights under Labor Contracts, 73 Yale LJ 1215 (1964 . . . ."

The foregoing, in Vaca v. Sipes, states the general rule: Grievance procedures contracted upon by the employer and the union which represents the employee are the employee's exclusive method by which he must seek redress if so provided by the Company-Union Contract and the employee may not maintain a suit to litigate his controversy against the employer until such grievance procedures have been exhausted. The court also proceeds to demonstrate when the rule will be to the contrary because of a breach of the contract

by the employer or a breach of duty owing to him by the union to fairly prosecute his grievance. In light thereof we consider the situation in the instant case in a test to decide whether, within contemplation of law, there is reason to depart from the general rule so as to permit plaintiff to maintain his suit against the employer for damages for wrongful discharge from employment without having exhausted grievance procedures so contracted. Actually this being an appeal from a summary judgment granted the defendant, the test is whether defendant's proof established as a matter of law that plaintiff cannot by evidence make out a prima facie case.

For the purpose of arriving at answer we may, and will, presume that the defendant had wrongfully discharged plaintiff. Thereupon the plaintiff invoked the quasi-judicial process contractually provided by the contract agreed upon by and between the union of which he was a member and the defendant which was his employer. There would have been no cause of action for wrongful discharge but for the agreement mentioned; it is solely because there was such, and because of the provisions of that contract, that discharge of the plaintiff from his employment might be said to have given rise to such character of action.

The contract, in its essential particulars, provided that the employer and the union might settle a grievance filed on behalf of an employee at any of four "stages", the last stage being arbitration procedure in the event the dispute occasioning prosecution of a grievance not be settled at stage three or some earlier stage; and further provided that if the grievance be

not certified beyond stage three within 30 days after there is a decision thereat the grievance should be considered closed on the basis of such decision. Already stated was the decision and settlement of plaintiff's grievance at such stage of the grievance procedure, to-wit: "Mr. Duckstein has not contacted the Company or the Union. Due to lack of information and co-operation from Mr. Duckstein, case close." The contractual grievance procedure included the provision, as follows: "Settlement of grievances can be reached by the Company and the Union at any stage without the acquiescence of any individual employe who may be affected directly or indirectly by such settlement." By Vaca v. Sipes it appears settled that such a contractual provision is binding and proper.

Though timely notified of the closing of the case based on his grievance the plaintiff did nothing. He had secured other employment about this time. He did not insist upon the Union processing his grievance beyond stage three, nor did he even request that such be attempted. He filed suit against the defendant December 22, 1970, after elapse of more than three years.

By his points of error plaintiff presents his case as one wherein the Union of which he was a member was weak and ineffective and not able to offer reasonable representation of him in his claim that his discharge from employment was wrongful; that under these circumstances it would be ridiculous to require that he "go through the motions" of the grievance procedure provided by the contract before resorting to the courts. Further, that the trial court erred in granting the defendant's motion for summary judgment because

there was more than a scintilla of evidence that the Union was so weak and ineffective as not to be able to offer reasonable representation to its members and/or that the Union was so weak and ineffective as to make reliance on the Union's efforts ridiculous.

Plaintiff cites, in addition to *Vaca*, the case of Republic Steel Corp. v. Maddox, 379 US 650, 13 L ed 2d 580, 85 S Ct 614 (1965). In that case Maddox brought suit in an Alabama state court against his employer for severance pay allegedly owed under the terms of the collective bargaining agreement existing between the employer and Maddox' union. Maddox made no effort to utilize the grievance procedure provided in such agreement. He was upheld in a judgment he obtained through the Alabama Supreme Court. A Writ of Certiorari was granted by the United States Supreme Court. In the opinion of that Court it was written: (p. 583, 13 L. Ed.)

"As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. (Footnote omitted.) If the union refuses to press or only perfunctorialy presses the individual's claim, differences may arise as to the forms of redress then available."

The holding of the United States Supreme Court in Republic Steel Corp. v. Maddox was one which reversed the Alabama courts upon a holding that in neither the facts nor the pleadings had Maddox shown

that he could not have availed himself of the grievance procedure provided by the contract of his union with his employer. By reason thereof the holding was that he was not by his suit entitled to the judgment for severance pay granted him by the Alabama judgment.

Plaintiff additionally cites Kaufman v. Goldberg, 315 N.Y.S. 2d 35, (Sup. Ct., Kings County, 1970), in which it is stated (p. 42) as follows:

"... There is however, a line of cases in other jurisdictions which imposes on a union the duty of fair representation to its members and that the violation of that duty permits the employee to proceed directly against the employer. The authorities are exhaustively researched and discussed in Jenkins v. Schluderberg-T, etc., Co., 217 Md. 556, 144 A. 2d 88, (see 45 Corn. L. Q. 25). In *Jenkins*, the court held that where the union acted in an arbitrary and discriminatory manner in failing to proceed on behalf of the employee against the employer, the employee may proceed directly. The court quoted (at pp. 564-565, 144 A. 2d at p. 93) from the article by Professor Cox in 69 Harvard Law Review 601, 652:

" ' "While the rule which bars an individual employee from bringing an action on the contract when the union is unwilling to take the case to arbitration is sound if the union has made an adjustment or is satisfied that the grievance lacks merit, nevertheless it would work injustice in situations where the union is unwilling to press the claim because of indifference or reluctance to suffer the expense. . . ." ' "

Based upon the foregoing, which as applied to the

case cited constituted dictum merely, the plaintiff advances the proposition and theory that "Conceivably a union could be so weak as to be a farce and make enforced reliance on its efforts ridiculous." Plaintiff furthermore contends "the evidence offered in the two Affidavits in Opposition to Defendant's Motion for Summary Judgment raise more than a scintilla of evidence that the union was so weak that to force an employee to rely on it and have no recourse in the courts would result in great injustice."

The defendant has countered this argument by the claim that what plaintiff is contending is a "yes, but" plea as in confession and avoidance, which has not been made a part of plaintiff's pleadings. We do not need to refer to the pleadings to verify since this is a summary judgment case. In such a case the omission of an affirmative defense in respondent's pleading will not waive the defense, and his opponent's motion for summary judgment is properly denied when the record raises (or leaves raised) a material fact issue with respect to such affirmative defense. Bachman Center Corporation v. Sale, 359 S. W. 2d 290 (Dallas Civ. App., 1962, writ ref., n.r.e.); 4 McDonald, Texas Civil Practice (1971 Rev.) Ch. XVII "Judgments", p. 180, Sec. 17.26.12 "(Summary Judgments) (IV) Determination of Motion".

In such an instance the burden is upon plaintiff to raise by evidence a fact issue upon such affirmative defense in opposition to the defense of defendant once it has been established. "Moore" Burger, Inc. v. Phillips Petroleum Company, 492 S. W. 2d 934 (Tex. Sup., 1972). In *"Moore" Burger* the affirmative defense was

that of promissory estoppel, advanced in the effort to avoid the defendant's reliance upon the statute of frauds applicability of which was established as a matter of law.

In a test of the evidence produced by the plaintiff in the attempt to raise an issue of his affirmative defense to defendant's own defense, established as a matter of law, it is observed that the evidence has probably raised the issue of weakness and ineffectiveness of the Union. What such evidence does not raise, however, is an issue of the Union's breach of the statutory duty of fair representation, i.e. a showing that evidence exists that the Union's purported representation of plaintiff was "arbitrary, discriminatory, or in bad faith." In Vaca v. Sipes the Supreme Court took occasion to hold that exactly this is required in order to show that a union has breached its duty of fair representation of the union member. The other cases mentioned as cited by the plaintiff do not qualify or change the holding. Thus if plaintiff has merely raised only an issue of union weakness and ineffectiveness in presenting his grievance he has failed to raise the issue of that breach of duty requisite to be shown in justification of his resort to litigation in the District Court.

It takes little legal analysis to realize that to depart from the aforementioned requirement that the evidence raise the issue that union action (or non-action) was "arbitrary, discriminatory, or in bad faith" would be to substantially destroy the effectiveness of griev-

ance procedures commonly provided by union contracts.

Except for the extended expiration of time since the event giving rise to plaintiff's complaint it might be that it would be better to modify the trial court's judgment so as to decree that the action be dismissed. Lindsey v. General Dynamics Corporation, 450 S. W. 2d 895 (Waco Civ. App., 1970, no writ history). Here no benefit to plaintiff could accrue by such reformation.

Judgment is affirmed.

/s/ Frank A. Massey
Frank A. Massey
Chief Justice

SEPT. 21, 1973

THE STATE OF TEXAS
COUNTY OF TARRANT

I, Lida Swanson, Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas, certify that the foregoing is a full, true and correct copy of the opinion delivered by said Court on the 21st day of September, 1973, in the above numbered and entitled cause.

Given under my hand and seal of the Court of Civil Appeals on this the 30th day of April, A.D., 1974.

/s/ Lida Swanson
Clerk

[SEAL]

October 19, 1973

Henry G. Duckstein
18990-17429 vs.
General Dynamics Corporation,
Fort Worth Division

This day came on to be heard motion by appellant for a rehearing in this cause, and said motion having been duly considered by the Court is hereby overruled.

* * * * *

THE STATE OF TEXAS
COUNTY OF TARRANT

I, Lida Swanson, Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas, certify that the foregoing is a full, true and correct copy of the order overruling the motion for rehearing on October 19, 1973, in the above numbered and entitled cause.

Given under my hand and seal of the Court of Civil Appeals on this the 30th day of April, A.D. 1974.

/s/ Lida Swanson
Clerk

[SEAL]

APPENDIX C

IN THE
SUPREME COURT OF TEXAS

January 23, 1974

No. B-4308.

Henry G. Duckstein
vs.
General Dynamics Corporation,
Fort Worth Division

From Tarrant County,
Second District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Henry G. Duckstein, pay all costs incurred on this application.

March 6, 1974.

No. B-4308.

Henry G. Duckstein
vs.
General Dynamics Corporation,
Fort Worth Division

From Tarrant County,
Second District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 6th day of May, 1974.

GARSON R. JACKSON, Clerk
/s/ Eugene Cervenka, Deputy.
Eugene Cervenka

APPENDIX D

In its Brief In Support of Motion for Summary Judgment in the trial court Respondent stated on page 1: "By response to defendant's second set of requests for admissions, plaintiff admits that at all times material to the controversy involved in this suit, defendant was engaged in interstate commerce within the meaning of the Labor Management Relations Act, 29 U.S.C., Sec. 141, et seq."

On page three of this brief Respondent stated: "By virtue of being subject to the Labor Management Relations Act, the relations of the parties with respect to the particular point under discussion are governed by federal law."

On page five of this brief Respondent stated "Should there remain any question about the applicability of federal law to the breach of union contract claim that plaintiff is making in this case, it would be removed by the clear statement of the Supreme Court in *Republic Steel Corp.* that:

> "Federal law governs 'Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter. . . .' Section 301(a) of the LMRA, 29 USC § 185(a) (1958 ed), Textile Workers v. Lincoln Mills, supra. The suit by Maddox clearly falls within the terms of the statute and within the principles of Lincoln Mills, and because we see no reason for creating an exception, we conclude that the general federal rule applies."

APPENDIX E

NO. 96-5206-70

IN THE DISTRICT COURT
96th JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

HENRY G. DUCKSTEIN
VS.
GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION

PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Henry G. Duckstein, Plaintiff in the above styled and numbered cause, and makes this response to Defendant's Motion for Summary Judgment, relying on all pleadings, depositions, admissions, answers to interrogatories and affidavits on file herein and to be filed herein within the time prescribed by law, including the affidavits of Henry G. Duckstein and Bart Lynch filed herewith. The record thus made establishes that there are issues as to material facts and that Defendant is not entitled to judgment as a matter of law for the following reasons:

A. 1. Since the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defend-

dant, plaintiff is not limited to the grievance procedures in the union agreement.

A. 2. Alternatively, Plaintiff made a good faith and reasonable attempt to exhaust his remedies through the grievance procedures in the union agreement, and inasmuch as the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defendant, plaintiff is not limited to the grievance procedures in the union agreement.

A. That plaintiff attempted to use the grievance procedure in the union agreement was not such an "election" as to bind him to the results of the grievance procedure and preclude his taking other legal avenues of approach.

C. 1. Plaintiff is not precluded by the union agreement from bringing this lawsuit, inasmuch as the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defendant.

C. 2. Alternatively, plaintiff is not precluded by the union agreement from bringing this lawsuit, inasmuch as the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defendant, and plaintiff made a good faith and reasonable attempt to exhaust his remedies through the grievance procedures in the union agreement.

D. Plaintiff did not abandon or fail to pursue said grievance. Plaintiff made a good faith and

reasonable attempt to exhaust his remedies through the grievance procedure in the union agreement.

E. 1. Plaintiff has standing to bring this suit even though the union agreement provides that the union will be the sole and exclusive representative of the individual members, since the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defendant.

E. 2. Alternatively, plaintiff has standing to bring this suit even though the union agreement provides that the union will be the sole and exclusive representative of the individual members, since the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defendant, and plaintiff made a good faith and reasonable attempt to exhaust his remedies through the grievance procedures in the union agreement.

F. Plaintiff made a good faith and reasonable attempt to exhaust the remedies available to him under the grievance procedures in the union agreement.

G. Plaintiff's claim, to the extent plaintiff might contend that all or some part of his claim is not based on the union agreement, is not barred by the statute of limitations.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that defendant's Motion for Summary Judg-

ment be in all respects overruled.

Respectfully submitted,

/s/ James M. Bond
James M. Bond
Attorney for Plaintiff
3023 East Rosedale Street
Fort Worth, Texas 76105
534-1401

NO. 96-3206-70

IN THE DISTRICT COURT
96th JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

HENRY G. DUCKSTEIN
VS.
GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS
COUNTY OF TARRANT

KNOW ALL MEN BY THESE PRESENTS:

That before me, the undersigned authority, on this date personally appeared Henry G. Duckstein, who, after having been duly sworn by me, upon his oath deposed and said as follows:

"My name is Henry G. Duckstein, and I am plaintiff in the above styled and numbered cause. I reside at 4316 Ramey, Fort Worth, Texas, but I am presently employed in Brownsville, Texas. I am a former employee of General Dynamics Corporation, Fort Worth Dvision, Defendant in the above styled and numbered cause. I was employed from 1954 until my discharge in 1967. During my employment I was represented by the Federated Independent Texas Union (FITU). It was common knowledge that members of the reputable CIO-AFL union referred to FITU as a company-union.

After my discharge by General Dynamics, I was refused admittance to the plant by the plant guards. I was unable to contact any of the union officers in the plant and I was unable to contact them elsewhere, because the union had no permanent headquarters.

I was unable to obtain my personal belongings from inside the plant, and I was compelled to engage an attorney to aid me in recovering my goods from the plant.

My only course by which I was able to contact the union was by phone. I explained the situation to Mr. Bart Lynch, acting union committeeman of our department, as soon as I became aware I had been discharged, and he assured me that a grievance would be filed on my behalf. I never abandoned my grievance or complaint.

In the summer of 1961, I was given a three day lost-pay layoff. I filed a grievance with the union to have the lost pay restored. Although I presented the union

with documentary proof of my innocence, I still lost the case. The union cooperated with the company's request.

In the summer of 1966 the company had adopted a method whereby some of the work in Dept. 24-2 was being transferred to another department. This was a contract violation. Even after five grievances were filed to stop this practice the company ignored the grievances. The union lost these five cases.

I filed a grievance in the early part of 1967 to compel the company to equalize overtime as per union contract, but the union backed down when the grievance got to the third stage and they forfeited the case.

The union was so weak that it was able to win less than 10% of its cases.

Dalton Miller states in his affidavit that he made attempts to contact me through fellow workers. But I never received word that Mr. Miller desired information from me. As Chairman of the Grievance, he was the only official with authority to argue my case. If Mr. Miller's statement that he was unaware of my discharge is true, then General Dynamics violated another provision of the contract which states that the union will be informed immediately if any drastic action is taken against any union member.

I cannot recall ever knowing a Mr. Creed. His statements that I contacted him by phone and imparted confidential information of my private life are untrue.

I have personal knowledge of the facts stated in this affidavit and can testify thereto."

Further affiant sayeth not.

/s/ Henry G. Duckstein
Henry G. Duckstein

SUBSCRIBED AND SWORN TO Before me this 4th day of November, 1972.

/s/ Monette S. Fugate
Monette S. Fugate
Notary Public in and for
Tarrant County, Texas

NO. 96-5206-70

IN THE DISTRICT COURT
96th JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

HENRY G. DUCKSTEIN
VS.
GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS
COUNTY OF TARRANT

KNOW ALL MEN BY THESE PRESENTS:

That before me, the undersigned authority, on this

day personally appeared Bart Lynch, who, after having been duly sworn by me, upon his oath deposed and said as follows:

"My name is Bart Lynch, and I reside at 340 West Hallmark Drive, Fort Worth, Texas. I was employed by General Dynamics Corporation, Fort Worth Division, about 1963 and continued my employment there until some time after Henry G. Duckstein's discharge. I was a member of Federated Independent Texas Unions, Aircraft Local No. 900, the same union of which Henry G. Duckstein was a member, and I became an officer in this union. At all times during my employment by General Dynamics Corporation, Fort Worth Division, the Federated Independent Texas Union was a so-called Company-union. It was not affiliated with any of the International Unions, thus it was not able to obtain free legal advice or financial aid in time of need. If a costly arbitration decision threatened as the last means to settle a grievance, the union generally would drop the grievance and lose the case.

Although the FITU contract provided for equalization of premium paid overtime work, the union was never able to compel the company to comply with this provision.

I have knowledge of more than ten grievances being filed in 1965 to have this discriminatory condition corrected but the union lost every case.

The top union officers were untrained and lacked college orientation, thus, they were no match for General Dynamic's highly efficient labor relations person-

nel. The result was that the great majority of the cases were won by the company.

The FITU operated on a shoestring. It had no permanent headquarters, consequently it was very difficult to contact the union officials. Its records were haphazardly kept at the union secretary's home. And the union had very little financial resources.

Since I was Acting Committeeman at the time of Henry G. Duckstein's discharge, Henry G. Duckstein contacted me and explained the situation soon after his discharge.

I have personal knowledge of the facts stated in this affidavit and can testify thereto."

Futher affiant sayeth not.

/s/ Bart Lynch
Bart Lynch

SUBSCRIBED AND SWORN TO Before me this 4th day of November, 1972.

/s/ Monette S. Fugate
Monette S. Fugate
Notary Public in and for
Tarrant County, Texas

APPENDIX F

Petitioner's points of error in the Court of Civil Appeals were as follows:

POINT ONE

If a union is so weak and ineffective as not to be able to offer reasonable representation to its members, a member should not be precluded from resorting to the courts after the union's efforts on his behalf have failed.

POINT TWO

If a union is so weak and ineffective as to make reliance on the union's efforts ridiculous, an employee should not be barred from the courts because of the union's existence nor required to go through the motions of the union grievance procedure before resorting to the courts.

POINT THREE

The court below erred in granting appellee's motion for summary judgment because there was more than a scintilla of evidence that the union was so weak and ineffective as not to be able to offer reasonable representation to its members and/or that the union was so weak and ineffective as to make reliance on the union's efforts ridiculous.

Petitioner's points of error in Petition for Writ of Error in the Supreme Court of Texas were as follows:

POINTS OF ERROR

POINT ONE

The Court of Civil Appeals erred in overruling Petitioner's Point One, reading as follows:

> If a union is so weak and ineffective as not to be able to offer reasonable representation to its members, a member should not be precluded from resorting to the courts after the union's efforts on his behalf have failed.

POINT TWO

The Court of Civil Appeals erred in overruling Petitioner's Point Two, reading as follows:

> If a union is so weak and ineffective as to make reliance on the union's efforts ridiculous, an employee should not be barred from the courts because of the union's existence nor required to go through the motions of the union grievance procedure before resorting to the courts.

POINT THREE

The Court of Civil Appeals erred in overruling Petitioner's Point Three, reading as follows:

> The court below erred in granting Appellee's Motion for Summary Judgment because there was more than a scintilla of evidence that the union was so weak and ineffective as not to be able to offer reasonable representation to its members and/or that the union was so weak and ineffective as to make reliance on the union's efforts ridiculous.

POINT FOUR

The Court of Civil Appeals erred in holding that the test with regard to whether the union had breached its duty of fair representation was whether "the union's purported representation of Plaintiff was 'arbitrary, discriminatory, or in bad faith.' "

POINT FIVE

The Court of Civil Appeals erred in holding that "if Plaintiff has merely raised only an issue of union weakness and ineffectiveness in presenting his grievance he has failed to raise the issue of that breach of duty requisite to be shown in justification of his resort to litigation in the District Court."

POINT SIX

The Court of Civil Appeals erred in holding or assuming that Petitioner did not exhaust grievance procedures under the contract.

Petitioner's points of error in Motion for Rehearing in the Supreme Court of Texas were as follows:

This Honorable Court erred in not granting the application for writ of error on the First Point of Error which reads:

> If a union is so weak and ineffective as not to be able to offer reasonable representation to its members, a member should not be precluded from sorting to the courts after the union's efforts on his behalf have failed.

This Honorable Court erred in not granting the

application for writ of error on the Second Point of Error which reads:

> If a union is so weak and ineffective as to make reliance on the union's efforts ridiculous, an employee should not be barred from the courts because of the union's existence nor required to go through the motions of the union grievance procedure before resorting to the courts.

This Honorable Court erred in not granting the application for writ of error on the Third Point of Error which reads:

> The court below erred in granting Appellee's Motion for Summary Judgment because there was more than a scintilla of evidence that the union was so weak and ineffective as not to be able to offer reasonable representation to its members and/or that the union was so weak and ineffective as to make reliance on the union's efforts ridiculous.

This Honorable Court erred in not granting the application for writ of error on the Fourth Point of Error which reads:

> The Court of Civil Appeals erred in holding that the test with regard to whether the union had breached its duty of fair representation was whether "the union's purported representation of Plaintiff was 'arbitrary, discriminatory, or in bad faith.' "

This Honorable Court errer in not granting the application for writ of error on the Fifth Point of Error which reads:

The Court of Civil Appeals erred in holding that "if Plaintiff has merely raised only an issue of union weakness and ineffectiveness in presenting his grievance he has failed to raise the issue of that breach of duty requisite to be shown in justification of his resort to litigation in the District Court."

This Honorable Court erred in not granting the application for writ of error on the Sixth Point of Error which reads:

The Court of Civil Appeals erred in holding or assuming that Petitioner did not exhaust grievance procedures under the contract.

APPENDIX G

SECTION XII

GRIEVANCE PROCEDURE

1. The parties agree that unfairness to employes shall not exist and no employe shall be discriminated against for using the Grievance Procedure hereinafter set forth.

2. For purposes of this Agreement, a "grievance" shall be defined as any alleged violation of the terms or provisions of this Agreement or difference of opinion as to its interpretation and/or application, when reduced to writing on a form approved by the parties. Grievances shall be presented in writing signed by the aggrieved employe and his Departmental Committeeman, except that grievances relating to matters general in character which cannot be settled by an immediate supervisor or department head shall be valid when signed by a member of the Union's Plant Committee and submitted to the Director of Industrial Relations, if originating with the Union. Complaints or charges against the Union originating with the Company may also be known as grievances and shall be valid when signed by the Director of Industrial Relations and submitted to the Chairman of the Union's Plant Committee.

Settlement of grievances can be reached by the Company and the Union at any stage without the acquiescence of any individual employe who may be affected directly or indirectly by such settlement.

3. A grievance to be valid must be submitted with-

in five (5) working days after the aggrieved knew or by reasonable diligence could have known of the occurrence of the act or omission upon which it is based except as otherwise provided for herein. In cases of discharge or layoff of any nature, the grievance to be valid must be filed within two (2) working days from the time the employe leaves the plant, it being further understood and agreed, however, that no employe shall be required to leave the plant upon discharge, disciplinary layoff or suspension without being permitted to discuss his case in the presence of his Committeeman if the employe so requests.

4. Subject to the requirements of this Section in respect to the handling of grievances, any individual employe may present a request or complaint directly to his immediate supervisor.

5. Stage One

An aggrieved employe and/or his Committeeman may present and attempt to settle a grievance with the employe's immediate supervisor during working hours. This supervisor shall give his written answer within one (1) working day thereafter.

6. Stage Two

Failing a satisfactory settlement in Stage One, the aggrieved employe and/or his Committeeman within one (1) working day thereafter may take the grievance up with the department superintendent or department head, who shall give his written answer three (3) working days thereafter.

7. Stage Three

If a satisfactory answer does not result from Stage One and Stage Two, then the grievance may be referred to the Director of Industrial Relations and will be scheduled for the next regular weekly meeting with the Union Plant Committee. Such meetings will be held weekly on Wednesday between the hours of 1:30 p.m. and 3:30 p.m. when there are unsettled grievances filed with the Company for this Stage, twenty-four (24) hours in advance of said meeting.

8. Failure of the moving party to process a grievance within any of the time limitations specified in Stages One, Two and Three, shall render the grievance closed and settled on the basis of the last decision given. If a grievance is not answered within the time limits specified in each Stage, it shall be deemed to move to the next Stage unless the parties agree to extend the time.

9. Stage Four—Arbitration

If the parties fail to reach a satisfactory settlement in Stage Three within thirty (30) days, then within nine (9) working days thereafter, the grievance may be certified to Stage Four, and if not certified to Stage Four within such limitations shall be considered closed on the basis of the decision given in Stage Three.

10. The parties may select an arbitrator by mutual agreement. Failing to agree to an arbitrator within thirty (30) days, the parties shall request the Federal Mediation and Conciliation Service to furnish a list

of five (5) names from which the parties shall select an arbitrator within five (5) working days from receipt of the list, by agreement, or, failing to agree, by alternately striking names from the list.

11. The arbitration hearing shall be held within ten (10) days after the Arbitrator has been selected unless it is agreed otherwise, by the parties, due to just cause affecting either party.

12. The Arbitrator shall not have jurisdiction to arbitrate new provisions or new clauses into this Agreement, nor to add to, nor to modify, nor to arbitrate away in whole or in part any provisions of this Agreement. The Arbitrator's decision shall be submitted in writing and shall be binding on both parties. Notice of any claims by either party that an Arbitrator's Award hereafter rendered hereunder is invalid in whole or in part, under the laws of Texas, shall be served in writing upon the other party within ten (10) days after receipt of the written award in question, and thereafter the party giving such notice shall proceed as promptly as possible with the institution of proceedings, seeking to modify or set aside the award. The parties agree that if such notice is not given, such failure shall constitute a waiver of any legal objections to said award.

13. The expense of arbitration including the fee of the Arbitrator and any other necessary expenses shall be borne equally between the Company and the Union.

APPENDIX H

In the Directory of National Unions and Employee Associations 1971, Bulletin 1750, U. S. Department of Labor, Bureau of Labor Statistics 1972, the latest issue available, may be found the following words on page 63: "A total of 200 organizations—175 classified as unions and 25 as professional and State employee associations—are listed in this directory. AFL-CIO affiliates accounted for 114 of the unions, another 61 unions were unaffiliated. Approximately 9 percent of the combined membership was represented by associations; members of unions affiliated with the AFL-CIO represented approximately 77 percent of total union membership."

On pages 66 and 67 of the same publication we read under the heading of *Unaffiliated or Independent Unions:*

"A total of 65 national or international unions not affiliated with the AFL-CIO were known to the Bureau in 1970. All of the unaffiliated unions, other than those organizing government employees, reported agreements covering different employers in more than one State. (Footnote omitted.) The combined membership of these unions for 1970 was estimated at 4.8 million . . .

"Unaffiliated local unions are generally confined to a single establishment, employer, or locality, and therefore do not meet the Bureau's interstate definition of national unions, used in compiling this and previous directories. A 1967 Bureau survey showed about

475,000 members in 884 unaffiliated local unions. According to the Bureau's findings, these local independent unions represented approximately 2.3 percent of the total 1970 union membership in the United States."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1786

HENRY G. DUCKSTEIN, *Petitioner*

v.

GENERAL DYNAMICS CORPORATION, FORT WORTH DIVISION, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

Brief For Respondent In Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1786

HENRY G. DUCKSTEIN, *Petitioner*

v.

GENERAL DYNAMICS CORPORATION, FORT WORTH DIVISION, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

Brief For Respondent In Opposition

Petitioner's attempt to secure further review ignores (a) his admitted inability to produce any evidence that a union of higher quality could have brought his grievance to a different conclusion and (b) the absence of the slightest proof that his union failed to pursue his grievance as diligently as any union would, regardless of its effectiveness, considering petitioner's lack of interest and cooperation, and is bottomed on the false premises (a) that he made reasonable efforts to cause the union to act on his behalf and (b) that there was competent evidence that his union was weak and ineffective. When properly viewed in the light of the true record, petitioner's effort is exposed as one to gain a ruling that, despite all else, a mere conclusion-

ary assertion that his union is weak and ineffective is sufficient reason to supplant the exclusive contract grievance procedures by court action.

DECISIONS BELOW

The trial court granted a summary judgment on alternative, independent grounds that (1) the contract grievance remedies were exclusive, (2) by electing initially to submit his complaint to determination by the grievance procedures petitioner deprived himself of any right he otherwise might have had to seek recovery through court action, (3) the decision in the grievance process against petitioner, from which he sought no contractually sanctioned review, became a final and determinative one, (4) he failed to exhaust contract remedies, and (5) he is bound by the contract proviso that the union shall be his sole and exclusive representative in matters pertaining to the contract (R. App., p. A-1).[1] Petitioner's appeal to the Court of Civil Appeals did not question, or preserve a right to complain of, the basic soundness of any of these grounds, but, by way of avoidance of these otherwise unchallenged defenses, urged only that an exception exists because, he contended, there is "more than a scintilla of evidence" that his union was weak and ineffective (P. App., p. A-27).

By scrupulous application of the principles announced by this Court in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, and *Vaca v. Sipes*, 386 U.S. 171,

[1]The reference "R. App." is to respondent's separately bound appendix and "P. App." is to the appendices of petitioner that are under common cover with the Petition.

the Court of Civil Appeals rendered its opinion that the summary judgment evidence relied on by petitioner did not raise an issue of fact that would support an exception to the grounds of respondent's motion (P. App., p. A-3). Contrary to an implication of the Petition, the Texas court did not decide that the evidence raised the issue of weakness and ineffectiveness of the union, but only commented in passing that it "probably" was raised (P. App., p. A-12). The issue was not decided because it was not a relevant one in the context of the summary judgment record.

The action of the Texas Supreme Court in refusing to review the judgment of the Court of Civil Appeals with the notation "No Reversible Error" means that the Court was not satisfied with the opinion of the intermediate court in all respects but was of the belief that the application for review presented no error that required reversal (Rule 483, *T.R.C.P.*, R. App., p. A-25). Thus there is no indication that the Texas Supreme Court agreed that the evidence "probably" raised the issue of weakness and ineffectiveness of the union. While denying its relevance, respondent contends that such an issue was not raised by competent evidence.

JURISDICTION

Respondent agrees that federal labor law was determinative of the merits of its grounds for summary judgment.

The Petition presents neither of the grounds contemplated by this Court's Rule 19-1(a) because (a)

the exclusive remedy question was decided by this Court in *Republic Steel Corp. v. Maddox*, *supra*, and the question of what will constitute an exception to the exclusive remedy rule was decided in *Vaca v. Sipes*, *supra*, and (b) the decision of the Court of Civil Appeals was in strict accord with *Republic* and *Vaca*. There is no special and important reason for grant of writ of certiorari in this case.

QUESTION PRESENTED

Petitioner's statement of the Question Presented, if it purports to be related to the record of this case, is incorrect and incomplete because: The record has no evidence to support a finding that petitioner made "reasonable efforts" to cause the union to act on his behalf, nor does it contain competent evidence that the union was weak and ineffective. His statement does not acknowledge that he failed to produce any evidence (a) that a higher quality union could have caused his grievance to reach a different conclusion or (b) that the union, whatever its quality, did not pursue the grievance as diligently as possible.

The real question presented is:

> Should the Court supplant the exclusive contract remedies by court action in a case in which the claim is made that the union was weak if (a) the only evidence offered in support of poor union quality are conclusionary statements by the complaining member and his friend, (b) there is no evidence that the member made reasonable efforts to assist the union in its representation of him,

(c) there is evidence that he failed to exercise diligence to pursue his contract remedies, (d) there is no evidence that a union of higher or different quality could have caused his grievance to be resolved favorably to him, and (e) there is no evidence that the union did not pursue his grievance as diligently as possible, taking into account his lack of interest and cooperation?

Its proper answer is self-evident.

STATUTE INVOLVED

Because the right of petitioner to bring an action in a district court of the United States is not in issue, respondent denies that Section 301(a), *L.M.R.A.*, 29 U.S.C., Section 185(a), is "the statute involved" (Petition, p. 3). The statutes involved in this case are *L.M.R.A.*, Sections 201(c) [61 Stat. 152, 29 U.S.C. 171(c)] and 203(d) [61 Stat. 153, 29 U.S.C. 173(d)], which establish the federal labor policies important to this case. They read as follows:

Sec. 201(c)

That it is the policy of the United States that—

* * * *

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of

such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

Sec. 203(d)

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

STATEMENT OF THE CASE

Petitioner's claim is that by terminating his employment in June 1967 respondent breached a collective bargaining agreement that had been entered into between respondent and petitioner's union (R. App., p. A-16), which provided petitioner's sole basis for complaint of wrongful discharge and contained grievance procedures that defined his exclusive remedy for breach (P. App., A-7, A-32-A-35). He availed himself of the contract grievance procedures, but, because of lack of interest and/or for other reasons, he failed to diligently pursue his grievance (R. App., A-4-A-10, A-22-A-25; Petition pp. 4-5; P. App., p. A-8). Thereafter, his grievance was resolved against him by settlement between respondent and the union, as was authorized by the agreement (P. App., pp. A-5, A-8).

Pertinent excerpts from petitioner's oral deposition are quoted at R. App., pp. A-22 - A-25. They show that although petitioner knew of the settlement within a few days after it was reached he chose not to seek the further review (P. App., p. A-8). Instead, he waited over three years and then filed his suit in December 1970 by which he asked the courts to determine issues that his union had covenanted with respondent would be within the exclusive province of the contract grievance procedures (P. App., p. A-8).

The claim of union weakness and ineffectiveness was first made as an afterthought almost two years later in pleadings that were filed in November 1972 in reply to respondent's motion for summary judgment. The grounds assigned in the motion were as heretofore stated under the heading Decisions Below.[2]

Dispositions made by the Court of Civil Appeals

---

[2]While respondent is of the belief that the summary judgment record shows conclusively and as a matter of law that petitioner's discharge was proper, such a defense was not assigned as a ground in the motion because of respondent's belief that propriety of the discharge is not a subject for judicial determination. The recitations in the Court of Civil Appeals opinion of events pertaining to the discharge are mere recital of allegations made by petitioner in his trial court pleading. The deposition testimony of petitioner shows that the trial court pleading was not candid. For example, petitioner failed to acknowledge that he had returned from Mexico and was in Fort Worth either the day on which he was to return to work or the day before, and that he immediately returned to Mexico without notifying respondent, although he knew his return trip would cause him to be days late in his return to work (pp. 101-119, 2nd deposition of petitioner). Until it was uncovered in his second deposition taken in September 1972, petitioner had failed to disclose, even to his lawyer, his return to Fort Worth (pp. 111-114, 2nd dep.). Other than his wife, the only person who theretofore had been made aware of his return was his friend, Mr. Bart Lynch, on whose affidavit petitioner relies in support of his claim of union weakness and ineffectiveness (p. 105, 2nd dep.).

and the Texas Supreme Court of petitioner's appeal from the adverse summary judgment were as previously stated under the heading Decisions Below.

Petitioner does not deny the exclusive nature of the contract grievance procedures. He concedes that federal labor law controls and that federal labor policy directs that a suit of this type will be permitted only in an exceptional case. His sole basis for claiming that his is an exceptional case is his assertion that his union breached its statutory duty of fair representation by being of poor quality. The only points of error he assigned in the Court of Civil Appeals and in his application to the Texas Supreme Court were to the effect that summary judgment should have been denied because the summary judgment record contained more than a scintilla of evidence that, in the abstract, his union was "weak and ineffective" (P. App., p. A-27). He makes no claim of causal relationship — that is, that his grievance would have had a different result if his union had been of higher quality. To the contrary, in his motion for rehearing to the Texas Supreme Court he admitted:

> "There is no way Petitioner could show that the result of the union/company dealings with regard to the termination of his employment would have been different if the union had been of higher quality."

The only things proposed by petitioner as evidence of union weakness and ineffectiveness are the affidavits of petitioner and his friend, Mr. Bart Lynch (P. App., pp. A-21 - A-26). Respondent submits that, even

if weakness and ineffectiveness were relevant, the conclusionary statements contained in those affidavits would not raise such an issue. The reference to the union as a "company-union" proves nothing. To say that, standing alone, the percentage of grievance cases won by the union proves anything would not be realistic because the circumstances of each individual case would have to be known and analyzed before any significance could be attached to a won-lost record.

The observation, in passing, of the Court of Civil Appeals that the evidence "probably" raised the issue of weakness and ineffectiveness of the union obviously was not the result of a studied analysis of the evidence. The court correctly decided that the issue was not relevant, and studied it no further. Likely, this observation is the reason why the Texas Supreme Court made the "No Reversible Error" notation when it refused further review.

ARGUMENT

The Petition should be denied because:

(1) The state court has not decided a federal question of substance not heretofore determined by this Court.

(2) The state court decision is in accord with applicable decisions of this Court.

(3) The theory petitioner urges as a new exception to rules heretofore announced by this Court is not a sound one.

(4) The record in this case causes this not to

be a desirable case upon which to base a decision as to whether or not union "weakness and ineffectiveness" can ever be an exception to the rules heretofore announced by this Court.

The following is respondent's separate treatment of each of these reasons:

The State Court Has Not Decided a Federal Question Of Substance Not Heretofore Determined By This Court

In *Republic Steel Corp. v. Maddox*, 379 U.S. 650, this Court declared that federal labor policy requires that contract grievance procedures be given exclusive effect, saying:

> " . . . Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. LMRA Sec. 203(d), 29 U.S.C. Sec. 173(d); Sec. 201(c), 29 U.S.C. Sec. 171(c) (1958 ed.). Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees." (379 U.S. 650, 653.)

And:

> "A contrary rule which would permit an individual employee to completely sidestep available

> grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure 'cannot be made exclusive, it loses much of its desirability as a method of settlement.' A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" (379 U.S. 650, 653.)

The circumstance that the employee complaint is related to discharge does not remove it from the ambit of the exclusive remedy rule for, as this Court said in *Republic Steel Corp.:*

> " . . . Grievances depending on severance claims are not critically unlike other types of grievances. Although it is true that the employee asserting the claim will necessarily have accepted his discharge as final, it does not follow that the resolution of his claim can have no effect on future relations between the employer and other employees. Severance pay and other contract terms governing discharge are of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employment relationship. Only in the situation in which no employees represented by the union remain employed, as would be the case with a final and permanent plant shutdown, is there no possibility of a work stoppage resulting from a severance-pay claim. But even in that narrow situation, if applicable law did not require resort to contract procedures, the inability of the union and employ-

er at the contract negotiation stage to agree upon arbitration as the exclusive method of handling permanent shutdown severance claims in all situations could have an inhibiting effect on reaching an agreement. If applicable law permitted a court suit for severance pay in any circumstances without prior recourse to available contract remedies, an employer seeking to limit the modes of redress that could be used against him could do so only by eliminating contract grievance procedures for severance-pay claims. The union would hardly favor the elimination, for it is in the union's interest to afford comprehensive protection to those it represents, to participate in interpretations of the contract, and to have an arbitrator rather than a court decide such questions as whether the company has determined to 'close permanently.'

"There are, then, positive reasons why the general federal rule should govern grievances based on severance claims as it does others. Furthermore, no positive reasons appear why the general federal rule should not apply. 'Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills,' and 'the subject matter of Section 301(a) "is peculiarly one that calls for uniform law"' " (379 U.S. 650, 656-657).

The Court did recognize in *Republic Steel Corp.* that the contract grievance procedure would not be the "exclusive remedy" if the contracting parties expressly agreed otherwise, saying:

"The federal rule would not of course preclude Maddox' court suit if the parties to the collective bargaining agreement expressly agreed that ar-

> bitration was not the exclusive remedy." (379 U. S. 650, 657.)

But, the Court went on to say:

> "... Any doubts must be resolved against such an interpretation." (379 U.S. 650, 659.)

Nothing in the collective bargaining agreement in question remotely suggests that its grievance procedures are not the exclusive remedy.

The principles stated in *Republic Steel Corp.* were reaffirmed by this Court in *Vaca v. Sipes*, 386 U.S. 171, in which the Court said:

> "However, if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced." (386 U.S. 171, 184.)

Nor has the question of what will constitute an exception to this exclusive remedy rule been left undecided by this Court. In *Vaca v. Sipes, supra*, the Court recognized that a union member can avoid the effect of the exclusive remedy rule if there is a breach by the union of its duty of fair representation, and went on to provide the exact test to be applied in determining whether or not such a breach has occurred, saying:

> "A breach of the statutory duty of fair repre-

> sentation occurs *only* when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." (Emphasis added.) (386 U.S. 171, 190.)

And, the Court made the positive holding that the breach of duty issue must be resolved by application of this test, saying:

> "Applying the proper standard of union liability to the facts of this case, we cannot uphold the jury's award, for we conclude that *as a matter of federal law the evidence does not support a verdict that the Union breached its duty of fair representation.* As we have stated, Owens could not have established a breach of that duty merely by convincing the jury that he was in fact fit for work in 1960; *he must also have proved arbitrary or bad faith conduct on the part of the Union in processing his grievance.*" (Emphasis added.) (386 U.S. 171, 193.)

Thus, this Court has already determined each federal question of substance that is dispositive of this case.

The State Court Decision Was In Accord With Applicable Decisions Of This Court

All that need be said here is that the opinion of the Court of Civil Appeals (P. App., pp. A-3-A-13) shows on its face that the state court was careful to base its decision on the controlling rules heretofore announced by this Court and that those rules were correctly applied. The application made by the Texas court of the decisions of this Court was similar to the one made by

a United States District Court in *Encino v. Tony Lama Company*, 316 F.Supp. 239 (U.S.D.C., W.D. Tex., 1970), in which the court said:

> "*Even if plaintiff could show that the union representation had been of poor quality* [which is by no means established], *he would not have met the burden which is upon him in this suit to show that the union's actions in refusing to arbitrate his case were arbitrary, discriminatory or in bad faith vis-a-vis plaintiff*. There is no evidence that union conduct with regard to plaintiff was arbitrary, discriminatory or in bad faith.
>
> "To obtain the relief which plaintiff here seeks, it must be shown that the contract provided plaintiff rights which have been denied him, and additionally, that there was arbitrary, discriminatory, or bad faith conduct on the part of the union in processing or refusing to process the grievance. Plaintiff has failed to present any evidence in support of either necessary element of his case." (Emphasis added.) (316 F.Supp. 239, 243-244.)

The Theory Petitioner Urges As A New Exception To Rules Heretofore Announced By This Court Is Not A Sound One

Adoption of petitioner's theory would cause a major undermining of the collective bargaining process and would cut directly across the congressionally established policy that "contract grievance procedures [are the] preferred method for settling disputes and stabilizing the 'common law' of the plant."[3] In each case in which an employee wishes to sidestep the griev-

[3] *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653.

ance procedures in favor of court action he would be able to do so by the simple expedient of raising an issue of union ineffectiveness, which, according to petitioner's theory, could be done by conclusionary affidavits of the employee and one or more of his friends that the union has a poor "batting average" on grievances and has the reputation of being a "company-union".

The ultimate determination of whether or not the grievance procedures can be bypassed always would rest with the fact finder, judge or jury as the case may be, and would depend in large part on local sentiment. There would be no degree of certainty as to the contract rights of the parties, with the result that the employer would have no incentive to include grievance procedures in the collective bargaining agreement and would be inclined to negotiate a contract that contemplates resolution of contract disputes by court action instead of contractually approved procedures. The employer would have no reason to want a contract grievance procedure if an employee could so easily have court review after having unsuccessfully tried his hand at the contract remedy.

A rule of the kind proposed by petitioner would not only create a new exception to the exclusive remedy rule but, for all practical purposes, would destroy the rule. In addition to asking that quality of the union be taken into account, petitioner contends that an exception to the exclusive remedy rule should exist even though no showing is made that the union did not conduct itself properly in the case under scrutiny or that

a union of higher quality would have conducted itself differently or brought about a result desired by the employee. Nothing could be more incompatible with federal labor policy. The Texas court put it thusly:

> "It takes little legal analysis to realize that to depart from the aforementioned requirement that the evidence raise the issue that union action (or non-action) was 'arbitrary, discriminatory, or in bad faith' would be to substantially destroy the effectiveness of grievance procedures commonly provided by union contracts." (P. App., pp. A-12-A-13.)

The employees have as means of protecting themselves from a weak union their options not to accept the union as their representative in the first place and, once accepted, to replace it with another whenever they become dissatisfied. The employer should not be penalized because an employee has become generally dissatisfied with the union that he and his fellow employees chose to be their representative and with which the employer made contractual concessions on the premise that disputes would be resolved by the terms of the same contract. As the Texas court notes, respondent would have no right to complain in any forum of wrongful discharge were it not for the contract respondent's union negotiated for him and his fellow workers (P. App., p. A-7).

The Record In This Case Causes This Not To Be A Desirable Case Upon Which To Base A Decision As To Whether Or Not Union "Weakness And Ineffectiveness" Can Ever Be An Exception To The Rules Heretofore Announced By This Court

The petition is tantamount to a request for a ruling in the abstract that will have no real significance to the Duckstein-General Dynamics controversy. As previously noted, the question posed by petitioner assumes facts that are not supported by the record in this case. There is no evidence of "reasonable efforts" of petitioner, nor do petitioner's affidavits raise a genuine issue of union weakness or ineffectiveness. Moreover, respondent is confident that the Court would not want to decide a question of whether or not union quality can be a factor in bypassing the exclusive contract remedies on the basis of the record in a case such as this in which there is no evidence that the union did not do what any other union would have done and there is an admitted absence of evidence that a union of a different quality could have caused a different result to be reached.

If the Court were ever to be inclined to determine a question in which union quality in relation to the exclusive remedy rule is presented, a logical case for such a determination should be one in which clear evidence of poor quality exists and where, despite efforts of the member, the union, because of its poor quality, did not act or failed to act properly and the union quality was a factor in causing the member's griev-

ance to be resolved adversely to him. The record in this case is devoid of any of these ingredients.

Moreover, if such a question is to be decided, the decision should be made in a case to which the union is a party and has had a chance to put of record its proof on the claim that it is weak and ineffective. In *Vaca, supra,* this Court recognized the desirability of both the employer and the union being parties to a suit involving a claim of improper union representation.[4]

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

John H. McBryde
Attorney for Respondent

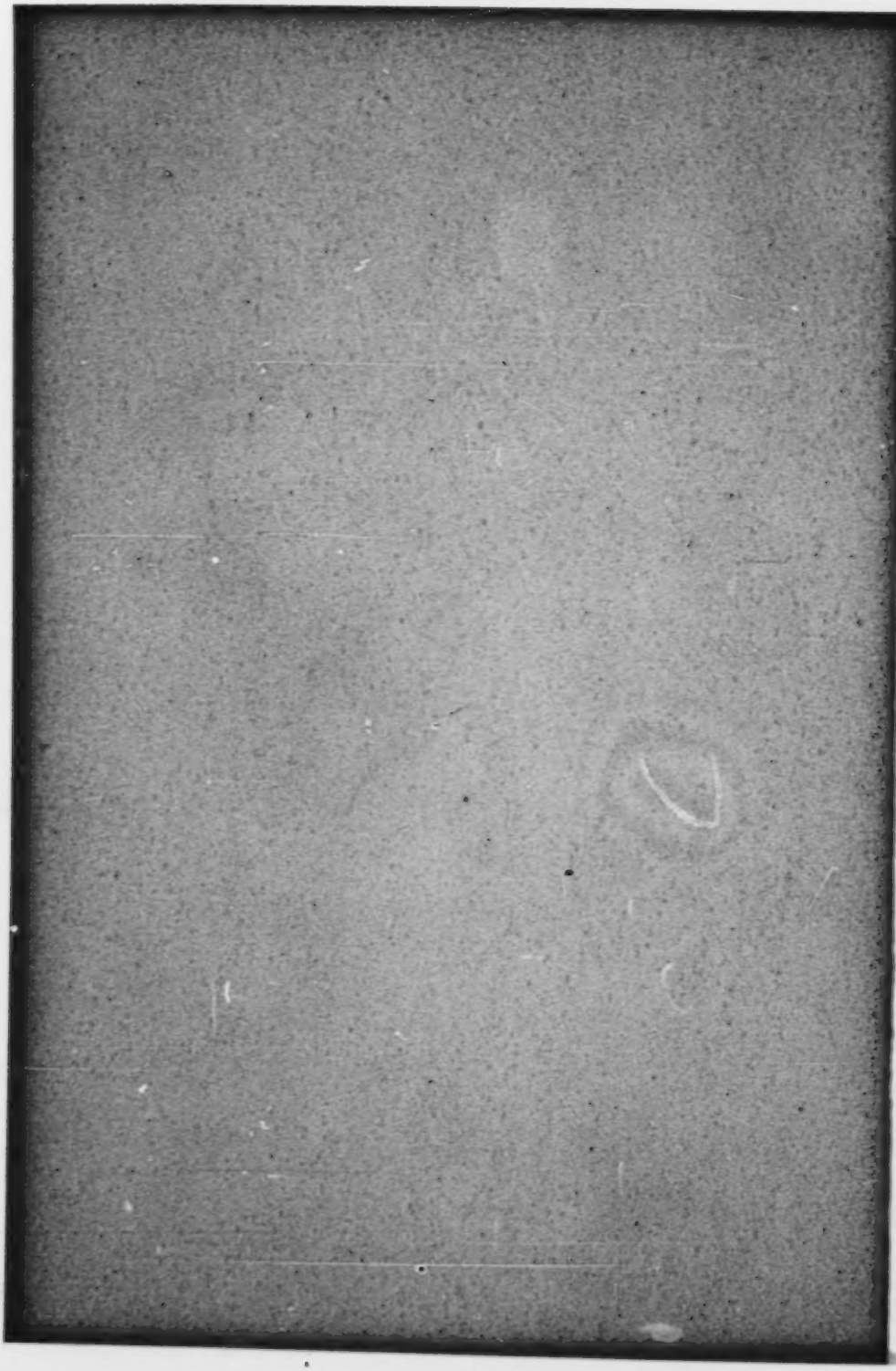
June 21, 1974

[4] *Vaca v. Sipes,* 386 U.S. 171, 197.

CERTIFICATE OF SERVICE

I, John H. McBryde, attorney for respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20 day of June, 1974, I served the foregoing Respondent's Brief in Opposition and the separate appendix thereto on petitioner by deposting in a United States mail box an envelope containing three true and correct copies of each, with first class postage prepaid, addressed to Mr. James M. Bond at 3023 East Rosedale Street, Fort Worth, Texas 76105.

John H. McBryde
Suite 1409, 210 West Sixth Street
Fort Worth, Texas 76102



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1786

HENRY G. DUCKSTEIN, *Petitioner*

v.

GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CIVIL APPEALS FOR THE SECOND
SUPREME JUDICIAL DISTRICT OF TEXAS

Appendix to Respondent's Brief

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APPENDIX A

(filed 10/17/72)
(caption omitted)

Motion for Summary Judgment

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes General Dynamics Corporation, defendant in the above entitled and numbered cause, and makes this its Motion for Summary Judgment, as authorized by Rule 166-A, Texas Rules Civil Procedure, and as grounds therefor would show the Court the following:

In support of this Motion defendant relies on all pleadings, depositions, admissions, answer to interrogatories and affidavits on file herein, and to be filed herein within the time prescribed by law. The record thus made establishes that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law for each and all of the following reasons:

A. The grievance procedures contained in the union agreement upon which plaintiff's suit is based provide the sole and exclusive remedy of plaintiff with respect to any claim of wrongful discharge by defendant of plaintiff, with the result that plaintiff is not entitled to assert a claim of wrongful discharge in this suit.

B. Alternatively, plaintiff either in person or through his representatives filed a grievance under the terms of said union agreement, complain-

ing that he was wrongfully discharged, and by said election plaintiff has deprived himself of any right he otherwise might have had to institute suit claiming wrongful discharge. If said grievance was not filed by plaintiff or with his authority, it was filed on his behalf, and plaintiff acquiesced in and/or ratified the filing of such grievance on his behalf.

C. In the further alternative, defendant would show that said grievance, filed as aforesaid, was determined adversely to plaintiff, and that by the terms of said union agreement plaintiff now has no further recourse.

D. In the further alternative, said grievance, filed as aforesaid, was abandoned by plaintiff, and that plaintiff failed to pursue said grievance, with the result that plaintiff now has no further recourse.

E. Plaintiff has no standing to bring this suit since said union agreement, to which plaintiff was bound by virtue of having been a member of said union, expressly provides that the union will be the sole and exclusive representative of the individual members thereof, and by virtue of the terms of said agreement said union is the sole party who is entitled to seek relief for violation or breach by defendant of said union agreement.

F. Alternatively, plaintiff failed to exhaust the remedies available to him under said union agreement and, therefore, cannot now maintain this suit.

G. To the extent that plaintiff might contend that all or some part of the claim asserted by him in this suit is not based on the provisions of said union agreement, plaintiff's claim is barred by the applicable statute of limitations.

WHEREFORE, PREMISES CONSIDERED, defendant prays that the foregoing Motion be scheduled for hearing, and that upon hearing thereof the Court render summary judgment for defendant, denying to plaintiff any of the relief sought by him.

(signature of counsel omitted)

APPENDIX B

(filed 10/17/72)
(caption omitted)

Affidavit in Support of Motion for Summary Judgment

STATE OF TEXAS
COUNTY OF TARRANT

KNOW ALL MEN BY THESE PRESENTS:
That before me, the undersigned authority, on this date personally appeared Dalton Miller, who, after having been duly sworn by me, upon his oath deposed and said as follows:

> "My name is Dalton Miller, and I reside at Route 4, Box 867, Burleson, Texas. I am presently employed by General Dynamics Corporation and have been so employed since March 14, 1942. In the months of June and July 1967 I was a member of the Federated Independent Texas Unions, Aircraft Local No. 900, and was serving in the capacity of Chairman of said union's Plant Grievance Committee. In that capacity I was responsible for signing and filing grievances which were general in character. In the latter part of June or early part of July 1967 I became aware that H. G. Duckstein had been terminated from his employment with General Dynamics, and upon receiving that knowledge I filed, on July 3, 1967, a grievance on behalf of Mr. Duckstein in order that any complaint that he might have arising out

of his termination of employment would be preserved for processing through the grievance procedure established by the union agreement. The instrument attached hereto as Exhibit A is a true and correct copy of the grievance that I filed on Mr. Duckstein's behalf. The grievance had been instituted in Stage 3 with the Plant Grievance Committee due to the fact that Mr. Duckstein was unavailable to sign the grievance. Another factor that entered into the filing of the grievance at Stage 3 was the fact that Mr. Duckstein was, himself, a Departmental Committeeman, and the practice was that when a grievance was filed on behalf of a Departmental Committeeman it would be filed at Stage 3. Both before and after I filed said grievance I sent word to Mr. Duckstein through fellow employes with whom I knew he was acquainted in an effort to induce Mr. Duckstein to furnish to me whatever information or justification he might have to substantiate the grievance. At no time did Mr. Duckstein either in person or through any other means, supply any information to me. Said grievance was accepted by General Dynamics Corporation as a proper grievance and as being a grievance by which the propriety of Mr. Duckstein's termination of employment could be determined. Some time between July 3, 1967 and August 16, 1967 I became a salaried employee and thereby automatically lost my status as Chairman of the union's Plant Grievance Committee. Consequently, I no longer participated in the handling of Mr. Duckstein's griev-

ance. I was replaced as Chairman of the union's Plant Grievance Committee by Mr. K. G. Creed, who thereafter was responsible for processing said grievance. Because of Mr. Duckstein's failure to communicate with me, either directly or indirectly, I never obtained any information or knowledge as to any claimed justification for Mr. Duckstein's failure to return to his employment at the conclusion of his vacation. Until his employment was terminated in June 1967, H. G. Duckstein was a Departmental Chairman in Department 24-2, second shift, the department in which he was employed, within the meaning of Paragraph 2, Section XII of the union agreement. I have personal knowledge of the facts stated in this affidavit and can testify thereto."

Further affiiant sayeth not.

/s/Dalton Miller
Dalton Miller

(jurat omitted)

APPENDIX C

(filed 10/17/72)
(caption omitted)

Affidavit in Support of Motion for Summary Judgment

STATE OF TEXAS
COUNTY OF TARRANT

KNOW ALL MEN BY THESE PRESENTS:
That before me, the undersigned authority, on this date personally appeared K. G. Creed, who, after having been duly sworn by me, upon his oath deposed and said as follows:

"My name is K. G. Creed, and I reside at 5600 Taylor Road, Fort Worth, Texas. I am employed by General Dynamics Corporation and have been so employed since September 15, 1942. At the present time I am Chairman of the Union Plant Grievance Committee for Federated Independent Texas Unions, Aircraft Local No. 900, and have served in that capacity since some time in July or August 1967. I replaced Dalton Miller in that capacity when he became a salaried employee at that time. When I assumed that capacity I also assumed responsibility for the handling of the grievance that had been filed July 3, 1967 on behalf of H. G. Duckstein. Between the time I took over responsibility for the handling of the grievance and August 16, 1967, I made repeated efforts to obtain from Mr. Duckstein information or verification that would support any claim on

his part that his discharge by General Dynamics was not proper, but without success. The grievance had been instituted in Stage 3 with the Plant Grievance Committee due to the fact that Mr. Duckstein was unavailable to sign the grievance. Another factor that entered into the filing of the grievance at Stage 3 was the fact that Mr. Duckstein was, himself, a Departmental Committeeman, and the practice was that when a grievance was filed on behalf of a Departmental Committeeman it would be filed at Stage 3. The grievance was discussed at each of the weekly Union Plant Committee meetings, but no action was taken or could be taken because of lack of information. The said grievance of H. G. Duckstein was closed at the weekly meeting of the Union Plant Committee held August 16, 1967, due to lack of information and cooperation from Mr. Duckstein and because the 30-day period within which to bring the Stage 3 grievance to a conclusion had expired. The closing of said grievance was by joint agreement of the union, acting through J. M. Martin, S. F. Dutton, and myself, constituting the union members of the Plant Grievance Committee, and R. B. Smith, the company member of the Plant Grievance Committee. The instrument attached hereto as Exhibit A is a true and correct copy of the grievance that was filed on Mr. Duckstein's behalf and the entry in the lower left hand corner of said exhibit reflects the action taken by the Union Plant Committee (also known as the Plant Grievance Committee) August 16, 1967. The sig-

natures contained at that place on the instrument are the signatures of J. M. Martin, S. F. Dutton, R. B. Smith and myself, and were placed on the original of said instrument on August 16, 1967. Some time in late October 1967 Mr. Duckstein called me and asked me the status of his grievance. I told him that it had been closed for the reasons above stated, and he replied that that was O.K. because he had a better job anyway, making twice as much money, and he really wasn't interested in pursuing it further. Some two or three weeks later Mr. Duckstein again called me and told me that he had lost his job and inquired if the grievance could be opened, in response to which inquiry I told him as far as I was concerned the grievance was closed but that I would talk to company representatives to see if the company would reopen it. I did talk to the company representatives the next day, and was advised by them that the company also considered the matter closed, and I advised Mr. Duckstein of that fact when he called me back that same day. Even during the three telephone conversations I had with Mr. Duckstein that I have just mentioned Mr. Duckstein gave me no information in support of his grievance or that would justify a grievance. I have personal knowledge of the facts stated in this affidavit and can testify thereto."

Further affiant sayeth not.

/s/K. G. Creed
K. G. Creed

(jurat omitted)

(Pertinent parts of Exhibit "A" to Miller and Creed Affidavits—Grievance Dated 7/3/67)

GRIEVANCE—Reinstate H. G. Duckstein Dept. 24-2 319109 (Tool Designer A) as an employe and reimbursement for all time lost plus savings plan. His discharge was an alleged violation of co. union agreement.

/s/Dalton Miller—Chairman Union Plant Committee

* * * * *

Plant Grievance Committee
Stage Three

16 August 1967

Settlement of grievance—Mr. Duckstein has not contacted the Company or the Union. Due to lack of information and co-operation from Mr. Duckstein, case closed.

(Signatures of Union and Company Representatives)

APPENDIX D

(filed 10/17/72)
(caption)

Defendant's First Amended Original Answer

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes General Dynamics Corporation, defendant in the above entitled and numbered cause, and makes this its First Amended Original Answer, showing to the Court the following:

1.

As it is authorized to do by the Court rules, this defendant denies generally, each and every, all and singular, the allegations contained in plaintiff's petition, and demands strict proof thereof.

2.

Defendant specifically denies that plaintiff was wrongfully discharged, but would further show that, even if he was, such a claim cannot be asserted by this suit because:

A. If plaintiff ever had any complaint of wrongful discharge his sole and exclusive remedy was under the grievance procedures outlined in the union agreement.

B. Pleading in the alternative, plaintiff either in person or through his representatives filed a grievance under the terms of said union agreement, complaining that he was wrongfully discharged, and by said election plaintiff has de-

prived himself of any right he otherwise might have had to institute suit claiming wrongful discharge. If said grievance was not filed by plaintiff or with his authority, it was filed on his behalf, and plaintiff acquiesced in and/or ratified the filing of such grievance on his behalf.

C. Defendant would further show that said grievance, filed as aforesaid, was determined adversely to plaintiff, and that by the terms of said union agreement plaintiff now has no further recourse.

D. Defendant would further show, in the alternative if necessary, that said grievance, filed as aforesaid, was abandoned by plaintiff, and plaintiff failed diligently to pursue said grievance. Consequently, plaintiff deprived defendant of an early determination by means of the contractually approved grievance procedure of plaintiff's complaint of wrongful discharge, with the result that plaintiff should now be precluded from asserting in this suit, which was brought approximately 2½ years after his discharge by defendant, that this discharge was wrongful. If the conclusion is reached that said grievance was not one properly filed by or on behalf of plaintiff, then plaintiff neglected to follow the contractually sanctioned grievance procedure that presumably would have afforded him full relief had his discharge in fact been wrongful. Consequently, in no event should plaintiff be entitled to recover from defendant any more than the loss that would have been sustained him during the period of time that

it would have taken to pursue a grievance under the union agreement to a final conclusion successfully to plaintiff, and plaintiff was obligated to mitigate his damages by pursuing said grievance procedure, but failed to do so.

E. If we assume, as plaintiff claims, that said union agreement was violated by plaintiff's discharge from defendant's employment, plaintiff has no standing to bring this suit since said union agreement, to which plaintiff was bound by virtue of having been a member of said union, expressly provides that the union will be the sole and exclusive representative of the individual members thereof, and by virtue of the terms of said agreement said union is the sole party who is entitled to seek relief for violation or breach by defendant of said union agreement.

F. Plaintiff failed to exhaust the remedies available to him under said union agreement.

3.

Defendant specifically denies that it discharged plaintiff without sufficient and just cause. In this connection, defendant affirmatively alleges that it had sufficient reason for discharging plaintiff from its employment. Alternatively, defendant would show that plaintiff, by his conduct, reasonably caused defendant to believe it had sufficient reason for discharging plaintiff, and defendant acted in good faith on the basis of a fact situation created by plaintiff that reasonably caused defendant to believe that plaintiff should

be discharged. In any event, defendant acted in good faith in discharging plaintiff and on the good faith belief that it had the right to discharge plaintiff. Defendant would further show that plaintiff now is estopped to deny that his discharge was proper.

4.

Defendant would further show, in the alternative if necessary, that if plaintiff's discharge from defendant's employment was not proper plaintiff was guilty of negligence and/or bad faith in failing to furnish this defendant and/or plaintiff's union sufficient evidence of his justification, if there was justification, for his absence from employment, and plaintiff cannot now complain of damages sustained beyond the period of time when he would have been reinstated in defendant's employment if he had furnished defendant and/or said union sufficient evidence of his justification for absence from work.

5.

Defendant would further show, if need be in the alternative, that plaintiff would not be entitled to recover the damages alleged by him because he has been occupied or, if he has not, he could have been occupied in another form of employment, earning substantial wages, so that his damages have been thus mitigated, or should have been thus mitigated.

6.

Defendant would further show, if need be in the alternative, that if plaintiff ever had a right to bring

suit against defendant for wrongful discharge, and defendant specifically denies that plaintiff ever had such a right, plaintiff lost that right by waiting approximately 2½ years after his discharge before instituting suit claiming wrongful discharge, and his claim, if he ever had any, is barred by the applicable statute of limitations.

7.

By waiting approximately 2½ years after his discharge to bring suit against defendant plaintiff is now barred by the doctrines of laches and/or estoppel and/or stale demand from claiming that he has any cause of action against defendant on the basis of his discharge from employment approximately 2½ years before he filed the suit.

WHEREFORE, PREMISES CONSIDERED, defendant prays that plaintiff recover nothing by reason of his suit and that defendant be dismissed with its costs in this behalf expended.

(signature of counsel omitted)

APPENDIX E

(filed 11/9/72)
(caption omitted)

Plaintiff's Second Amended Original Petition

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Henry G. Duckstein, hereinafter called Plaintiff, complaining of General Dynamics Corporation, Fort Worth Division, hereinafter called Defendant, and by way of original petition and for cause of action would respectfully show unto the Court as follows:

I.

Your Plaintiff is a resident citizen of Tarrant County, Texas. Defendant is a private corporation doing business in Texas and may be served at North Grants Lane, Fort Worth, Tarrant County, Texas.

II.

On January 24, 1966, Defendant and the Federated Independent Texas Unions, Aircraft Local No. 900, hereinafter referred to as the union, entered a contract. Such contract set forth conditions of employment and termination of employment for members of the union. The contract became effective on January 24, 1966, and was to run at least until January 25, 1971. Section III, Paragraph 1 of such contract states: "The management of the plant and the direction of the working force, including the right to hire, classify, promote, suspend or *discharge for proper cause*, to

transfer or relieve employes from duty because of lack of work, *or for other legitimate reasons*, is vested exclusively in the Company subject to all the provisions of this Agreement." (Emphases added.)

III.

On May 27, 1967, Plaintiff was an employee of Defendant and a member of the union. About May 27 or 28 of 1967, Plaintiff went to Mexico on a vacation. His vacation was to end, and he was to report back to work for Defendant, at 3:45 P.M. on June 6, 1967. While in Saltillo, Coahuila, Mexico, Plaintiff had a sudden and painful attack of gout. He could not walk without a cane. About June 4 or 5 of 1967, Plaintiff's toenails became infected, and Dr. Felipe Calderon (Dr. Felipe Calderon Mireles of Saltillo, Mexico) advised that Plaintiff's toenails be surgically removed. After a hurried trip to Fort Worth, Texas, to obtain funds, Plaintiff, on June 6, 1967, sent a telegram to Defendant. Said telegram stated, "I am reporting off: sick." On June 6, 1967, Plaintiff visited Hospital Civil de Saltillo (Saltillo Civil Hospital) in Saltillo, Coahuila, Mexico, and checked into said hospital on June 8, 1967. On June 9, 1967, Plaintiff's toenails were surgically removed.

IV.

On June 23, 1967, Plaintiff, in Fort Worth, Texas, learned that on June 6, 1967, Defendant had sent a telegram to Plaintiff's address in Fort Worth, Texas, which read, "We have reason to believe that you are able to return to work. If you do not report for work by 7:00 AM on 8 June 1967 or furnish written medi-

cal proof of your inability to do so you will be terminated." Plaintiff also learned that on June 15, 1967, a telegram had been sent to his home address in Fort Worth, Texas, which read, "This is to advise that you are being terminated effective 8 June for failure to furnish written medical proof of inability to work or report to work as instructed." Nobody had been at Plaintiff's home in Fort Worth, Texas, to receive either telegram.

V.

Plaintiff notified the union of what had happened, but he could not immediately get proof from Mexico. As was known to Defendant, Plaintiff had previously had sudden attacks of gout. It was not customary for a sick employee to have to furnish a doctor's certificate if he missed only a few days of work. On a previous occasion Plaintiff had been off sick as long as two months without having to furnish a doctor's certificate.

VI.

Before June of 1967 Defendant prepared and distributed to or made available to its employees a pamphlet or book entitled *Employe Handbook*. Under the heading of "Personal Conduct" on pages 75, 76, and 78, this Employe Handbook contained words quoted in Exhibit A, which is attached hereto and made a part hereof. Defendant did not distribute or make available to its employees any other writing or book before July of 1967 which was intended to overrule or supersede any writing in this *Employe Handbook*. Plaintiff had a contract with Defendant, the terms of which were

indicated by the words of this *Employe Handbook.*

(instrument does not have a paragraph VII)

VIII.

Defendant had a contract with the union. This contract contained terms which are reflected in Paragraph II above, and these terms of the contract were violated when Defendant dismissed Plaintiff to Plaintiff's injury. Plaintiff was a member of the union.

IX.

Alternatively Plaintiff alleges that Defendant had a contract with the union. This contract contained terms which are reflected in Paragraph II above, and these terms of the contract were violated when Defendant dismissed Plaintiff to Plaintiff's injury. Plaintiff was a member of the union and a third party beneficiary of said contract.

X.

Alternatively Plaintiff alleges that even if he has no cause of action resulting from breach of Defendant's contract with the union, he has a cause of action resulting from breach of the terms of Defendant's contract with Plaintiff mentioned in Paragraph VI above and quoted in Exhibit A attached hereto.

XI.

Due to lack of financial resources, lack of an independent operating base outside the premises of Defendant (the premises of Defendant being closed to the public), and apathy of its members at the time of Plaintiff's discharge and during the grievance proce-

dure which was initiated pursuant thereto, although Plaintiff made a good faith and reasonable attempt to exhaust his remedies through the grievance procedure set forth in the contract between Defendant and the union, the union could not have been expected to and did not offer substantial, independent, and forceful representation of Plaintiff and only perfunctorily pressed Plaintiff's claim.

XII.

Because of his seniority, if Plaintiff had not been discharged by Defendant as he was, he would not have been discharged and would have continued to work for Defendant until he retired. As a direct and proximate result of Plaintiff's dismissal and as was reasonably foreseeable to Defendant, Plaintiff has suffered and will suffer the following damages: At the time of his dismissal on or about June 8, 1967, Plaintiff was earning an average of $1,167.00 per month. In spite of Plaintiff's good faith efforts to find and work at other employment, he has earned only an average of $727.08 per month from the time of his dismissal through 1971. Plaintiff has suffered a loss in wages of $22,846.00 through 1971. Plaintiff estimates he will suffer a loss in wages of $21,164.16 before 1975, when he would have retired from Defendant's employ had he not been discharged. Plaintiff estimates he will live at least to the age of seventy-five years. From the age of sixty-five, when he would have retired from Defendant's employ had he not been discharged, to the age of seventy-five, he will suffer a loss of retirement benefits in the amount of $7,000.00 based on yearly retirement

benefits of $700.00. (If Plaintiff had continued working until he was sixty-five, Defendant would have contributed $60.00 per month toward retirement benefits.) Plaintiff would have saved $2,250.00 before he retired, which would have been placed in a savings account and matched by Defendant to make a total of $4,500.00 in the savings account for Plaintiff. Plaintiff suffered the loss of his life and hospitalization insurance which covered both himself and his wife, and he cannot get other insurance because of his gout and heart trouble. Plaintiff's medical expenses for himself and his wife were $100.00 in 1967, $150.00 in 1968, $300.00 in 1969, $200.00 in 1970, and $1,200.00 in 1971. Plaintiff estimates that because of not having the insurance above mentioned, and because of increasing ill health with advancing years, Plaintiff, in all reasonable probability, will suffer a loss in the amount of $20,000.00. Plaintiff estimates that he and his wife will live at least until the year 1987. In 1969 Plaintiff, through lowered earnings, lost 10% of the maximum Social Security contribution; in 1970 he lost 100% of the maximum Social Security contribution; and in 1971 he lost 60% of the maximum Social Security contribution. Plaintiff estimates he will suffer 50% loss of the maximum Social Security contributions over the years 1972-1975, and that his Social Security benefits will be cut by one-third, or $100.00 per month for a total loss of $12,000.00.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be duly cited herein and that upon final trial of this cause Plaintiff may have judgment against Defendant for damages of

$85,260.16 and for such other and further relief as to which Plaintiff may show himself justly entitled.

(Signature of counsel and Exhibit omitted)

APPENDIX F

(Excerpts of the oral depositions of petitioner, the first taken 2/5/71 and the second taken 9/2/72)

[pp. 14-15 of 2nd deposition]

"Q Did you do anything to attempt to pursue that grievance?

"A Other than inquire about it, no.

"Q Who did you inquire of?

"A A Union member, a Mr. — gosh, these names evade me. Mr. Salisbury. He worked in the same department as I did and he was quite informed on the Union activities.

"Q You say you talked to a Mr. Salisbury?

"A Yes.

"Q What was that conversation about, what was said?

"A I asked him how my grievance was progressing. The grievance was filed as a general grievance for discharge by one of the Officers of the company, I don't know whom — or of the Union. And he says they, the Grievance Committee would have an answer within — I think they met every 30 days — within 30 days they would know something.

"See, they only had a Chairman of the Grievance Committee who would meet with the company periodically and I think it was on—it would

be about 30 days, something like this. That's all I could get from him.

"Q Other than having one conversation with Mr. Salisbury about your grievance, did you do anything to pursue the grievance?

"A No, no."

[p. 20 of 1st deposition]

"Q Were you ever told in the processing of your grievance to prove your illness that you would be required to have a doctor's certificate?

"A Yes, yes, to prove it.

"Q O.K. Now, who told you this?

"A One of the union members.

"Q Now, did you ever get one of them. Did you ever get a report from Dr. Calderone?

"A Yes, later on.

"Q Well, when did you get this report?

"A Oh, possibly three months later."

[p. 24 of 1st deposition]

"Q You were informed by your union then that there had been a final determination of your grievance?

"A Yes.

"Q And you took no steps to see that this was appealed?

"A No. No."

[p. 25 of 1st deposition]

"Q Now, when did you learn from the union, by the way, that there had been a final determination of your grievance?

"A It must have been at least thirty days, maybe sixty days after I was terminated.

"Q You don't recall?

"A No.

"Q You were not working for anybody at this time?

"A Yes, I was at Chance-Vought.

"Q Well, you weren't too concerned about it at that time?

"A I was earning about twice as much money as I was earning at General Dynamics, and there was no particular reason to rush the issue when I didn't have any so-called proof, and I don't know whether I have proof today even. What is proof is something I don't know."

[p. 32 of 1st deposition]

"Q Well, did they tell you what they wanted? Did they give you some idea they wanted a statement from Dr. Calderone that you had been hospitalized and he had treated you down there? Isn't that basically what they told you they wanted?

"A Yes, this is basically what they wanted."

[pp. 16-17 of 2nd deposition]

"Q When did you learn what the outcome of the grievance was?

"A It appears I was working for De De Co. at the time.

"Q Do you know about what time it was, what month and approximately what part of the month?

"A I would say it was the latter part of July; I am not positive but it was —

"Q What were you advised at that time as being the outcome of the grievance?

"A That the Union was dropping the grievance.

"Q They were withdrawing the grievance.

"A Yes, they were withdrawing or they had settled with the company that I had no complaint or I had no justification for my grievance.

"Q Who advised you of that fact?

"A I don't really know.

"Q One of the Union representatives?

"A Yes, I believe. I believe it was one of the Union representatives but I don't know his name.

"Q One of them called you over the phone and told you that?

"A Yes, yes, he had called me.

"Q And was it your impression that that was something that had just happened?

"A Yes, recent, maybe within a few days."

APPENDIX G

Pertinent part of Rule 483,
Texas Rules of Civil Procedure

" . . . In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation 'Refused. No Reversible Error.' . . . "